

CALIFORNIA COASTAL COMMISSION

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STAFF REPORT AND RECOMMENDATION

ON CONSISTENCY DETERMINATION

Consistency Determination No.	CD-090-02
Staff:	MPD-SF
File Date:	2/6/2003
60th Day:	4/7/2003
75th Day:	4/22/2003
Commission Meeting:	3/4/2003

FEDERAL AGENCY: U.S. Army Corps of Engineers

PROJECT
LOCATION:

Main Channel, between the Coronado Bridge and the Naval Turning Basin at Naval Air Station North Island, San Diego Bay, and EPA-approved offshore dredge disposal site LA-5, 5.4 miles southwest of Point Loma (Exhibits 1-4)

PROJECT
DESCRIPTION:

550,000 cu. yds. (420,000 cu. m.) of dredging to deepen the main channel to -42 ft. MLLW (mean lower low water), with disposal at LA-5, including relocation of a 69 kV electrical cable (Exhibits 1-8)

SUBSTANTIVE FILE
DOCUMENTS:

See page 25.

[**Staff Note:** As discussed below, the Corps has not completed its "Green Book" testing to determine the suitability of the dredge material for open ocean disposal. Additional bioassay and bioaccumulation tests are pending, and may be available by the time of the hearing (in which case the staff would prepare an addendum to discuss the results). The Corps has nevertheless requested a March Commission hearing on this matter. Normally the staff would

not schedule the item until the biological tests results were complete by the time of the mailing of the staff report. However, in this case, because the critical issue raised is one of potential munitions in the material and the Corps' unwillingness to consider beach or nearshore disposal, the staff would recommend objection even if the material does pass the "Green Book" tests. Thus no benefit is gained by further delay.

The staff also has a number of additional unanswered questions about the project (p. 10) concerning the Corps beach suitability analysis methodology, proposed screening of the material at LA-5, a clear understanding of the relationship between the Corps dredging and adjacent proposed Port of San Diego Tenth Ave. Marine Terminal dredging, and a number of questions about the proposed disposal and relocation of the San Diego Gas and Electric (SDG&E) 69 kV electric cable which traverses the dredge site. The Corps responded on February 13, 2003 (Exhibit 13); however the staff has not had time to evaluate these responses prior to the mailing for this report. At this point, as discussed in the Executive Summary, the staff is recommending objection both on the merits (failure to consider beach/nearshore disposal) and lack of information (incomplete test results and other remaining unanswered questions). The staff will prepare an addendum analyzing the Corps' responses.]

EXECUTIVE SUMMARY

The U.S. Army Corps of Engineers ("Corps") is proposing 550,000 cu. yds. (420,000 cu. m.) of dredging to deepen the San Diego Bay Main Channel to -42 ft. below mean lower low water (MLLW)(from existing depths of -40 ft.), between the Coronado Bridge and the Naval Turning Basin at Naval Air Station North Island, with disposal of the material at the EPA-approved offshore dredge disposal site LA-5. The project also includes relocation of a 69 kV electrical line that runs under the Bay from San Diego to Coronado (to be performed by San Diego Gas and Electric (SDG&E)). The Corps states the deepening is needed due to shipping inefficiencies based on existing channel depths, which constrain shipping of deep draft vessels and necessitates their partial unloading at other ports (Los Angeles and Long Beach) before transiting to San Diego Bay destinations. Inefficiencies have also resulted in underutilization of the Tenth Avenue Marine Terminal in the Port of San Diego.

The primary issues raised by the proposal are whether the material is suitable for beach replenishment and whether such disposal would be feasible. The material is predominantly sand, which normally argues for beach or nearshore disposal. However the Corps asserts that the material is not suitable for beach disposal for two reasons: (1) its beach compatibility analysis does not show the material to be within 10% sand content of nearby receiver beaches; and (2) given that the Navy found ordnance in the entrance channel during its nuclear carrier homeport channel deepening project (CD-95-95, CD-140-97, CD-161-97), the Corps cannot rule out the potential for active ordnance/munitions in the material.

On the first of these points, the Corps' sediment analysis compared the dredge material with dry beach sand percentages only; if nearshore sand percentages are factored in, the material is likely to pass the "within 10% of the receiver beach" informal rule-of-thumb for beach compatibility. Regardless, the Commission normally considers a sand content of 80% or more to indicate beach compatibility.

On the second point: (1) the Navy found munitions several (approximately three) miles from where the Corps is proposing to dredge, and the Corps has provided no evidence that there would be ordnance or munitions in the project area; (2) the Navy recently dredged the central turning basin (CD-89-99) and has been monitoring the nearshore disposal site (for shallow water habitat creation) and found no evidence of active munitions as the disposal site; (3) the Corps states it intends to screen the material before disposal at LA-5 but has not explained why it can screen in the open ocean but not at a nearshore disposal site (such as at Imperial Beach); (4) the Navy was faced with the difficult, almost Sisyphean task of screening over 5 million cu. yds. of material; the Corps has not substantiated the cost infeasibility of screening approximately one-tenth that amount; (5) the Commission sued the Navy when the Navy proposed LA-5 disposal; the matter was resolved only when the Navy worked with Congress to appropriate funds to be used to replace the sand being lost; and (6) when the Commission objected and then litigated this concern in 1997-1998, the Commission noted that a federal consistency applicant should not rely on lack of project appropriations to avoid meeting Coastal Act requirements. (This Commission position was subsequently codified and incorporated into the federal consistency regulations (15 CFR §930.32(a)(3)).)

In addition, the San Diego Association of Governments (SANDAG) has written the Corps requesting it to consider nearshore disposal at Imperial Beach; however the Corps has not responded to this request, other than to generalize that: "... the Imperial Beach disposal area has been dropped from further consideration as the disposal area for this project in favor of the LA-5 offshore disposal site because of the potential Navy ordnance issues." The Corps has also not explained why it could not, as did the Navy, provide for replacement sand to offset the loss of approximately one half million cu. yds. to the littoral system. Therefore, given the high sand content in the proposed dredge material (above 80%), and absent evidence of munitions in the material or provisions for replacement quantities of sand, the project is inconsistent with the requirement of Section 30233(b) that material suitable for beach nourishment be disposed within littoral beach systems. The project is also inconsistent with two of the requirements of Section 30233(a): (1) because less damaging feasible alternatives to LA-5 disposal are available (e.g., disposal in the nearshore at Imperial Beach) the project is not the least environmentally damaging feasible alternative; and (2) because the Corps has not agreed to provide replacement sand it has not provided feasible mitigation for sand losses.

For similar reasons, because the Corps is unwilling to consider beach or nearshore disposal, the project does not maximize access and recreation opportunities in a region of the coast with serious shoreline erosion problems. Therefore, the proposed disposal at LA-5 would be inconsistent with the public access and recreation policies (Sections 30210-30212) of the Coastal Act.

A secondary issue raised by the project is the level of completeness of the Corps' sediment testing. The Corps believes the material has passed applicable "Green Book" tests and is suitable for disposal at LA-5. However, EPA has requested additional confirmatory bioassay and bioaccumulation tests that have not yet been completed. Without complete test results, the Commission lacks the necessary information enabling it to find the project consistent with the marine resources and water quality policies (Sections 30230 and 30231) or alternatives and mitigation tests of the dredging policy (Section 30233(a)) of the Coastal Act.

The Commission also lack sufficient information concerning the Corps beach suitability analysis methodology, proposed screening of the material at LA-5, a clear understanding of the relationship between the Corps dredging and adjacent proposed Port of San Diego Tenth Ave. Marine Terminal dredging, and a number of questions about the proposed disposal and relocation of the SDG&E 69 kV electric cable which traverses the dredge site. Answers to these questions are needed to fully analyze the project under the marine resource, sand supply, and public access and recreation policies of the Coastal Act.

I. STAFF SUMMARY AND RECOMMENDATION:

A. Project Description. The Corps submitted a consistency determination for dredging 550,000 cu. yds. (420,000 cu. m.) of sediment to deepen the San Diego Bay main channel to -42 ft. (plus 1.6 to 2 ft. overdredge) below mean lower low water (MLLW), with disposal at LA-5, and relocation of a 3,300 ft. long 69 Kilovolt (kV) electrical cable. The Corps created the main channel in 1974, when it dredged the navigation channels in the center of the Bay. In 1998, the Navy deepened the entrance channel (up to the area the Corps now proposes to deepen) to accommodate the homeporting of deep draft nuclear aircraft carriers (CD-90-95).

The main channel in this portion of the bay is currently at a -40 ft. depth, varying in width from 600 to 1,900 ft. The Navy recently dredged the entrance channel to the west to -47 ft. The South Bay channel to the east (from the Coronado Bridge to Sweetwater Channel) is at a -35 ft. depth.

The deepening would occur between a point approximately 250 ft. (75 m.) northwest of the Coronado Bridge and the area the Navy previously deepened to -50 ft. MLLW at the Naval Turning Basin at Naval Air Station North Island (NASNI) (CD-89-99). The Corps plans to dispose the material at LA-5, the EPA-approved dredge disposal site located 5.4 miles southwest of Point Loma. Dredging is scheduled to occur between September 15 and March 31, to avoid impacts to least terns. If dredging does continue into least tern season, turbidity curtains and other turbidity control measures will be implemented.

Several utility lines cross under the Bay where they intersect the narrowest part of the Main Channel. The proposed dredging would necessitate the relocation of one of these lines, a SDG&E 69 kV electrical cable, between its landfalls at Seaport Village in San Diego to the north and the Ferry Landing Marketplace in Coronado. The new cable would be located 300-350 ft. (90-150 m.) east of the current alignment (Exhibit 5) and would be installed by horizontal or water jet –assisted drilling. The existing cable would be removed or abandoned, depending on location. The portion of the cable within (and within 100 ft. on either side) of the dredge footprint would be removed or disposed of at an existing landfill or recycled. Any vegetated landscaped areas temporarily disturbed will be revegetated.

Dredging would occur using either a clamshell or hopper dredge, with the possible use of a handheld dredge in areas where tight controls are needed, such as around utility cables.

The new cable would be installed from either San Diego or Coronado. The cable construction is tentatively scheduled to commence in September 2003, with the dredging to commence in December 2003. The project would last approximately 7 months and end in April 2004, based on the current schedule. The Corps anticipates future maintenance dredging of the main channel would be needed approximately once every 25 years. Construction staging would occur at the Tenth Avenue Marine Terminal.

B. History of Munitions found in San Diego Bay Sediments. On November 16, 1995, the Commission concurred with a U.S. Navy consistency determination for the homeporting of a NIMITZ-Class nuclear aircraft carrier and associated improvements, including dredging for entrance channel deepening to -47 ft. MLLW (CD-95-95). The project originally included beach/nearshore disposal of up to 7.9 million cu. yds. of clean sandy material at four beaches throughout the County (Imperial Beach, Del Mar, Oceanside, and Mission Beach).

The Navy commenced disposal operations in September 1997, beginning with South Oceanside beach disposal and Mission Beach nearshore disposal. After disposing approximately 50,000 cu. yds. of sand at South Oceanside, the Navy discovered hazardous munitions (including live ordnance) in the dredge material. On September 21, 1997, the Navy found twenty .50 caliber casings, a 20 mm MK-2 unfired shell, and three .50 caliber blanks on the beach. On September 25, the Navy discovered an 81 mm mortar on the beach. On September 28, the Navy found a 40 mm M25 shell casing, a 20 mm M2 1944 shell casing, and a 45-70 mm MK12 shell casing, on its hopper dredge screens. No ordnance was found in investigations of nearshore disposal at Mission Beach, where about 7,000 cu. yds. were disposed.

Concerned about public health, but wishing to proceed expeditiously with the project, the Navy immediately ceased its beach and nearshore disposal operations and, on October 1, 1997, sought Commission authorization for disposal at LA-5 of the “Area 1” material. (See Exhibit 11 showing the 8 areas of the Navy’s project [munitions were found in Areas 1 and 4].) The Commission staff asked the Navy to request only the minimum necessary disposal at LA-5,

since at that time the Navy was still considering whether any of the Area 1 material could be safely used for beach replenishment. The Navy requested interim authorization from the Executive Director to dispose 561,000 cu. yds. of Area 1 material at LA-5, pending submittal of the matter to the full Commission for a public hearing. On October 3, 1997, the Executive Director informed the Navy that: "In the interim the Commission staff does not oppose the Navy's current request to proceed to place at LA-5 the Area 1 material ...". This authorization was based in part on the Navy's commitment to submit a consistency determination for Commission review of any further LA-5 disposal.

On October 3, 1997, the Navy also received authorization from the U.S. Army Corps of Engineers (Army Corps) and EPA, to take the entire Area 1 volume (3.44 million cu. yds) to LA-5, subject to certain conditions agreed to by the Navy, including that the Navy would screen the material using a 3-inch grating attached to the dredge pipeline intake.

On October 14, 1997, as a follow-up to its interim request to the Commission for disposal of 561,000 cu. yds. at LA-5, the Navy wrote to the Commission stating its intent to dispose of the remainder of the Area 1 material at LA-5, but still put a substantial amount of sand onto beaches (i.e., the sand from the "inner channel" (i.e., Areas 4, 5, 6, 8 and 10). The Navy estimated this remaining amount to be approximately 1.5 million cu. yds. of beach suitable material.

On November 6, 1997, the Commission objected to the Navy Consistency Determination CD-140-97, which had originally been submitted as a request to dispose of up to 2.61 million cu. yds. of "Area 1" material at LA-5, but which was modified during the public hearing, to a request to dispose of up to 645,000 cu. yds. and for a one month period. On November 13, 1997, the Navy submitted Consistency Determination CD-161-97, again for disposal of Area 1 material at LA-5 (this time for up to 871,000 cu. yds.). This submittal was withdrawn prior to any Commission vote.

On November 17, 1997, in dredging Area 4 and placing material on the beach at South Oceanside, the Navy discovered additional munitions, and subsequently suspended all beach/nearshore disposal. On November 19, 1997, the Navy informed the Commission that it was proceeding with the modified project for disposal at LA-5, despite the Commission's objection.

After the Commission filed a lawsuit, on January 28, 1998, the U.S. District Court issued a preliminary injunction enjoining the Navy from conducting further dredging decision (5 Fed.Supp.2d 1106 (S.D.CA 1998)). The injunction was "... conditioned upon the Commission's expeditious study of proposed alternatives to offshore dumping, including those set forth in the Harris Report, and the good faith of the parties to negotiate a resolution which is the stated goal of both sides."

On January 30, 1998, the Navy submitted Consistency Determination CD-9-98 for the disposal of all the remaining material at LA-5. Also on January 30, 1998, the Commission's Executive Director wrote the Navy outlining a potential solution involving: (1) obtaining an authorization to use any excess existing project funds not spent by the Navy for beach replenishment; (2) increasing the federal match ratio to allow the Navy to spend up to \$9.6 million in federal funds (to match \$4.7 million in State funds); (3) obtaining additional funding (up to approximately \$10 million) to make up for lost sand, "so that the end result is the placement of approximately the same amount of on-shore and near-shore sand as had been originally included in the Navy's project." This letter indicated that the staff could recommend that the Commission remove its opposition to continued dredging and concur with a revised consistency determination containing these features. The letter further stated that:

If the Navy agrees to vigorously seek this Congressional authorization, and if we can secure the firm support of the San Diego Congressional delegation for this initiative in the form of new legislation or an amendment to an existing bill, that would probably be as much assurance as we can reasonably expect.

On February 10, 1998, the Navy agreed to pursue legislative changes to allow the use of any remaining channel dredging project funds for beach nourishment, providing for alternative sources of sand including borrow site sand instead of channel sand for beach nourishment, as well as to support efforts to seek additional funds for beach nourishment "... up to or equal to the amount needed to provide the total amount of sand identified for beach replenishment in the project as approved [i.e., originally concurred with] by the Commission" Based on this agreement the Commission and the Navy jointly stipulated to a lifting of the District Court's preliminary injunction. The Navy subsequently modified its consistency determination to include these commitments.

On March 10, 1998, the Commission concurred with the Navy's modified consistency determination which authorized LA-5 disposal but included these commitments for beach replenishment (CD-9-98).

On April 20, 1999, SANDAG, which has become the lead agency implementing the beach replenishment project using the Navy's funds and matching State funds, published a Notice of Preparation of an EIR for the San Diego Regional Beach Replenishment Project. This project consists of dredging two million cu. yds. of sand from offshore borrow sites and placing the sand on 12 beaches in San Diego County (Exhibit 12). The Commission granted SANDAG Coastal Development Permit No. CDP-6-00-038 in November 2000 (and subsequent amendments 6-00-038-A1 and A-2). SANDAG commenced the replenishment activity in April 2001 and completed it on September 23, 2001.

C. Status of Local Coastal Program The standard of review for federal consistency determinations is the policies of Chapter 3 of the Coastal Act, and not the Local Coastal Program (LCP) of the affected area. If the Commission certified the LCP

and incorporated it into the CCMP, the LCP can provide guidance in applying Chapter 3 policies in light of local circumstances. If the Commission has not incorporated the LCP into the CCMP, it cannot guide the Commission's decision, but it can provide background information. The City of San Diego's and Coronado's LCPs and the Port of San Diego's PMP have been certified by the Commission and incorporated into the CCMP.

D. Federal Agency's Consistency Determination. The Corps of Engineers has determined the project to be consistent to the maximum extent practicable with the California Coastal Management Program.

E. Staff Recommendation: The staff recommends that the Commission adopt the following motion:

MOTION: I move that the Commission **concur** with consistency determination CD-090-02 that the project described therein is fully consistent, and thus is consistent to the maximum extent practicable, with the enforceable policies of the California Coastal Management Program (CCMP).

STAFF RECOMMENDATION:

Staff recommends a **NO** vote on the motion. Failure of this motion will result in an objection to the determination and adoption of the following resolution and findings. An affirmative vote of a majority of the Commissioners present is required to pass the motion.

RESOLUTION TO OBJECT TO CONSISTENCY DETERMINATION:

The Commission hereby **objects** to the consistency determination made by the Corps for the proposed project, finding that: (1) the project is not consistent to the maximum extent practicable with the California Coastal Management Program; and (2) the consistency determination for the proposed project does not contain enough information to evaluate the project's consistency with the California Coastal Management Program.

II. Applicable Legal Authorities. Section 307 of the Coastal Zone Management Act (CZMA) provides in part:

(c)(1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.

A. Procedure if the Commission finds that the proposed activity is inconsistent with the CCMP.

Section 930.43(a) of the federal consistency regulations (15 CFR § 930.43(a)) requires that, if the Commission's objection is based on a finding that the proposed activity is inconsistent with the CCMP, the Commission must identify measures, if they exist, that would bring the project into conformance with the CCMP. That section states that:

(a) In the event the State agency objects to the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the objection and supporting information. The State agency response shall describe: (1) How the proposed activity will be inconsistent with specific enforceable policies of the management program; and (2) The specific enforceable policies (including citations).

(3) The State agency should also describe alternative measures (if they exist) which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. Failure to describe alternatives does not affect the validity of the State agency's objection.

As described in the Dredging and Marine Resources section below, the proposed project is inconsistent with the CCMP. Pursuant to the requirements of Section 930.43 of the federal regulations implementing the CZMA, the Commission is responsible for identifying measures, if they exist, that would bring the project into compliance with the CCMP. Assuming the informational deficiencies identified in the following procedural discussion below (including passing "Green Book" tests) can be resolved, the Commission believes that it would be possible to bring this project into compliance with the CCMP if the Corps implements the following measures:

1. Dispose of the sediments in Imperial Beach on the beach or in nearshore waters (above -30 ft. MLLW), or within an alternative beach or nearshore zone in the region in a manner that would retain the material in the longshore littoral system; OR, alternatively, provide an equivalent sand supply (e.g., through dredging sand from offshore borrow pits and placing it on area beaches or nearshore sites).

B. Necessary Information. Section 930.43(b) of the federal consistency regulations (15 CFR Section 930.43(b)) requires that, if the Commission's objection is based on a lack of information, the Commission must identify the information necessary for it to assess the project's consistency with the CCMP. That section states:

If the State agency's objection is based upon a finding that the Federal agency has failed to supply sufficient information, the State agency's response must describe the nature of the information requested and the necessity of having such information to

determine the consistency of the Federal agency activity with the enforceable policies of the management program.

As described fully in the dredging, marine resources, sand supply, and public and access and recreation sections below, the Commission has found this consistency determination to lack the necessary information to determine if the proposed project is consistent with Sections 30230, 30231, and 30233(a) and (b), and 30210-30212 of the Coastal Act. In order to evaluate the project's consistency with the CCMP, the Commission needs the following information:

1. The Corps' beach suitability/sand content analysis, including an assessment of Imperial Beach beach transects from approximately +12 ft. MLLW to -30 ft. MLLW.
2. A description of the extent of screening being provided as discussed in the EIS, which states that to avoid placing unexploded munitions in the marine environment, the Corps proposes to screen all dredge materials prior to disposal at LA-5.
3. A map distinguishing the Corps dredging from the Port of San Diego's Tenth Ave. Marine Terminal dredging project.
4. Clarification as to whether the two are separate dredge projects, occurring at separate times and under separate contracts.
5. Completed bioassay and bioaccumulation test results and a letter or other communication from EPA that the project has passed all applicable Green Book tests and is suitable for open ocean disposal.
6. A list of governmental reviews, if any, that SDG&E will need to obtain prior to relocating the 69 kV electric cable.
7. A drilling fluid monitoring plan, or at a minimum a commitment to submit such a plan for Commission staff review and concurrence, prior to commencement of any drilling.
8. Clarification of which site the drilling will occur from (San Diego or Coronado – both sites are mentioned in the EIS as the possible primary drill site), or at least an explanation as to when this will be decided.
9. An estimate of the number of parking spaces, if any, that will be taken up by SDG&E during cable relocation activities, and an indication as whether any such spaces support coastal recreational activities, as well as whether sufficient capacity exists in the lot(s) to accommodate the temporary (approximately 7 month) construction period.
10. Evidence of landowner permission for the SDG&E to occupy the sites for cable drilling operations.

11. A map showing where the cable will remain in nearshore waters (as stated on p. H-8 of EIS/consistency determination).
12. Clarification as whether the Corps continues to intend to dispose of the cable at LA-5, an alternatives analysis for this disposal, and an explanation of why the Corps believes it could expect to receive authorization from EPA or the Commission for cable disposal at LA-5.

Answers to these questions are needed to fully analyze the project under the marine resource (Section 30230), dredging and filling (Section 30233(a)), sand supply (Section 30233(b)), and public access and recreation policies (Section 30210-30212) of the Coastal Act. The Corps has responded (Exhibit 13); however as of this date the staff has not had time to evaluate the responses.

C. Practicability. The federal consistency regulations implementing the CZMA include the following provision:

Section 930.32 Consistent to the maximum extent practicable.

(a)(1) The term “consistent to the maximum extent practicable” means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.

Since the Corps has raised no issue of practicability, as so defined, the standard before the Commission is full consistency with the policies of the California Coastal Management Program (CCMP).

D. Federal Agency Responsibility. Section C(a)(i) of Chapter 11 of the CCMP requires federal agencies to inform the Commission of their response to a Commission objection. This section provides:

If the Coastal Commission finds that the Federal activity or development project ... is not consistent with the management program, and the federal agency disagrees and decides to go forward with the action, it will be expected to (a) advise the Coastal Commission in writing that the action is consistent, to the maximum extent practicable, with the coastal management program, and (b) set forth in detail the reasons for its decision. In the event the Coastal Commission seriously disagrees with the Federal agency's consistency determination, it may request that the Secretary of Commerce seek to mediate the serious disagreement as provided by Section 307(h) of the CZMA, or it may seek judicial review of the dispute.

The federal consistency regulations reflect a similar obligation; 15 CFR §930.43 provides:

State agency objection. ...

(d) In the event of an objection, Federal and State agencies should use the remaining portion of the 90-day notice period (see §930.36(b)) to attempt to resolve their differences. If resolution has not been reached at the end of the 90-day period, Federal agencies should consider using the dispute resolution mechanisms of this part and postponing final federal action until the problems have been resolved. At the end of the 90-day period the Federal agency shall not proceed with the activity over a State agency's objection unless: (1) the Federal agency has concluded that under the "consistent to the maximum extent practicable" standard described in section 930.32 consistency with the enforceable policies of the management program is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency (See §§930.32(a) and 930.39(a)), or (2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects.

(e) If a Federal agency decides to proceed with a Federal agency activity that is objected to by a State agency, or to follow an alternative suggested by the State agency, the Federal agency shall notify the State agency of its decision to proceed before the project commences.

III. Findings and Declarations:

The Commission finds and declares as follows:

A. Dredging, Sand Supply, and Marine Resources.

1. Coastal Act Policies. The Coastal Act provides:

Section 30230. Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231. The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and,

where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment....

Section 30233. (a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities. ...

(b) Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable long shore current systems.

2. Overview. In order to concur with the Corps' consistency determination, the Commission must find the project would not adversely affect marine resources, water quality, and other environmentally sensitive habitat, and, because the project involves dredging within a coastal estuary, that the project complies with the three-part test of Section 30233(a) of the Coastal Act (i.e., the allowable use, alternatives, and mitigation tests). Under Section 30233(b) and (c), the Commission must also find that the project provides for beach replenishment where dredged material is suitable, and that the project will not alter the functional capacity of the estuary.

The project is an allowable use for dredging under Section 30233(a) as a new or expanded port and/or coastal-dependent boating facility. However, the Commission is unable to find the project consistent with the alternatives and mitigation tests of Section 30233 (a), with the water quality and marine resource protection policies (Sections 30230 and 30231), or with the sand supply test (Section 30233(b)). The primary issues are biological testing and the Corps's assumptions about beach compatibility. The sediment suitability issues hinge on three main concerns: biological test results, sand content and the potential for ordnance/munitions to render the material unsafe. The first issue raised is whether the biological testing has clearly established the suitability of the sediments for open ocean disposal as proposed at LA-5. Final test results are still pending, but if these tests are passed, the main issue then becomes whether the sediments are suitable for beach replenishment. If they are suitable, the proposed LA-5 disposal would not pass: (1) the alternatives test of Section 30233(a) (because beach disposal would be less environmentally damaging than LA-5 disposal); (2) the sand supply test of Section 30233(b) (which requires beach or littoral zone disposal where dredged sediments are suitable); and (3) the mitigation test of Section 30233(a) (because sand lost to the littoral system is not being mitigated).

Potential impacts of dredging on marine water quality include temporarily increased turbidity, reductions in dissolved oxygen, and potential resuspension, remobilization, and redistribution of any chemical contaminants present in the sediments. Dredging would result in losses of infaunal and epifaunal biota, and some burrowing and bottom dwelling fish within the dredge footprint. These impacts are typical of all dredge projects, and the Commission has historically determined no mitigation necessary for the temporary impacts from dredging harbors and disposal at EPA-approved offshore disposal sites such as LA-5, in the following situations: (1) where sediments pass “Green Book” tests; (2) where turbidity is a concern, the applicant includes turbidity monitoring, silt curtains or other turbidity-minimizing methods; (3) where disposal would not smother environmentally sensitive habitat or sensitive species, such as grunions, kelp, or rocky hardbottom habitat; (4) where dredging and disposal would minimize effects on least terns; and (5) where material is not suitable for beach or nearshore disposal (e.g., assuming acceptable biological test results, where the material contains less than 80% sand).

3. Biological Test Results. To determine the appropriate alternative(s), the Corps evaluated sediments proposed for dredging and disposal pursuant to the procedures described in the 1991 EPA/Corps testing manual, Evaluation of Dredged Material Proposed for Ocean Disposal -- Testing Manual (i.e., the “Green Book”). The testing procedures described in the Green Book allow for a tiered approach to analysis of the dredged sediments. It is necessary to proceed through the tiers only until information sufficient to determine compliance or noncompliance with EPA's regulations has been obtained. Only if there is not enough information to determine suitability or unsuitability for ocean disposal after the completion of a tier, will the applicant be required to complete the next tier testing.

To assure the material's suitability for ocean disposal, the Corps analyzed the physical and chemical characteristics of the dredged sediments. Because State and federal sediment quality criteria are not available for interpreting sediment chemical analysis, the National Oceanic and Atmospheric Administration (NOAA) sediment criteria (developed by Long and Morgan in 1990) are often used to interpret sediment data. If the levels of contaminants are higher than the ER-L, then it is **possible** that there will be a biological effect from the contaminant. If the level is above the ER-M, then adverse effects are **likely**. Levels between the ER-L and ER-M are considered to have possible effects, especially on sensitive species.

The Corps' submittal included test results from 1998 (Ogden 1998) which concluded that the material passed the Green Book standards and was suitable for ocean disposal. However EPA requested that the Corps undertake confirmatory test at the proper depths, as the 1998 results were for different dredge depths than now proposed by the Corps, and therefore may not be fully representative of the dredge material. The Corps' subsequent sediment chemistry tests showed slightly elevated contaminants in several core samples; the sample results of concern consisted of:

- (1) exceedences of ER-L levels in mercury in Cores # 6, 11 and 12;
- (2) an exceedence of ER-L levels in 2 PAHs (Acenaphthylene and Fluorine) in Core #4;
and
- (3) overall high PAH levels (although none specifically exceeding an ER-L number) in Cores 11-15.

These levels led EPA to request additional bioassay and bioaccumulation tests. The bioassay and bioaccumulation tests have not been completed. Without complete test results, the Commission lacks the information necessary for it to find the material suitable for ocean (the proposed LA-5) disposal, or for nearshore or beach disposal. The Commission therefore does not have sufficient information to find the project consistent with the marine resources and water quality policies (Sections 30230 and 30231) or with the alternatives and mitigation tests of the dredging policy (Section 30233(a)) of the Coastal Act.

4. Sand Supply/Beach Replenishment. Beach erosion is a major problem along many of the beaches in San Diego County. To be considered suitable for beach nourishment, sediment must be free of chemical contamination (i.e., pass Green Book tests described above) and consist primarily of sand of an acceptable grain size (usually approximately 80% sand, although another commonly used “rule-of thumb” is that the material should ideally fall within 10% of the percentage of sand content at the receiver beach). If placed on the dry upland portion of the beach, the grain size should ideally be compatible with the predominant grain size on the receiver beach as well. The Corps’ consistency determination shows, based on the initial testing (Ogden 1998) that the dredge material is 77-98% sand (consistency determination, p. H-21). The Corps’ subsequent confirmatory testing (AMEC, 2003) showed an average of cores 1-10 of 83.04 % sand (and 77.2% sand in cores 11-15). The Corps has conducted an additional beach compatibility analysis based on the AMEC results. These results provide a more precise representation of 81.8% sand (Exhibit 9).

The Commission would normally expect an applicant to implement beach or nearshore disposal where the sand content is above 80%. It is usually less expensive than ocean disposal, although the Corps states its estimates for the proposed project are about the same for beach or LA-5 disposal. Nevertheless the Corps has questioned the appropriateness of beach or nearshore disposal for two reasons. The Corps has compared the material to Imperial Beach and Mission Beach sand contents (which it estimates to be 96%) and has estimated the difference in sand content to be greater than 10%. The Corps states (Exhibit 9):

Where the fines on the receiver beaches average 3.6%, the average fines in the dredge prism come in at about 18%. This exceeds the LA District specifications [i.e., the “10% criteria”], and indicates incompatibility of the source material with the receiver site material.

The Commission has never been wedded to the “10% criteria,” especially for nearshore disposal where fines can be winnowed out by wave action. The Commission considers this criteria not to be a “hard and fast rule.” SANDAG has also questioned the Corps’ proposed application of this criteria to this situation (Exhibit 10). The Commission also notes that the Corps’ comparison with Mission and Imperial Beaches was not measured in the same way the Corps ordinarily makes such comparisons. The Corps usually takes a full beach transect from + 12 to -30 ft. MLLW; however in this situation [the analysis shown in Exhibit 9], the Corps only had available samples from dry beach areas. Such a comparison gives the receiver beach a higher sand content, which artificially skews the analysis away from a true compatibility comparison, especially if the material is proposed to be placed in nearshore waters, as the Commission staff and SANDAG’s Shoreline Preservation Committee have recommended that the Corps consider (Exhibit 10).

On the munitions issue, the because the Navy found munitions in Oceanside that came from its dredging of Areas 1 and 4 (Exhibit 11) as part of the entrance channel deepening/“homeport” project in 1997 (see pp. 5-7), the Corps questions the appropriateness of beach nourishment based on the potential for ordnance/munitions in these sediments. Therefore the Corps’ draft EIS has rejected beach replenishment as an alternative; the Draft EIS states:

In a separate action, the Navy began dredging the Central Navigation Channel in 1996 to support the homeporting of a NIMITZ Class Aircraft Carrier (U.S. Navy 1995). To accommodate the carrier, the Navy proposed to dredge the carrier berthing area, turning basin, and the San Diego Bay Navigation Channel. A portion of the dredge sediment was initially believed to be suitable for beach replenishment. During beach replenishment in the City of Oceanside, however, munitions were found in the dredged materials from San Diego Bay and beach replenishment efforts were halted. All subsequent material was disposed at LA-5.

Based on currently available technology, it is not possible to determine if similar ordnance is located within the proposed dredging area. Munitions detection equipment currently in use detects larger munitions and is not refined to detect the smaller shells (16 millimeters [0.63 inches] and smaller), which likely exist in a portion or all of the material to be dredged. Therefore, in the interest of public safety, a beach nourishment disposal alternative was not considered further in this EIS/EIR.

The Corps’ consistency determination states:

The concept of using the dredge material, from this proposed action, for beach nourishment was considered, specifically at Imperial Beach. Disposal of dredged material at Imperial Beach was removed from consideration because of the unknown presence of ordnance/munitions in the dredge material. Beach, nearshore, or surf zone disposal of dredged material containing ordnance/munitions may pose a hazard to both public safety and health.

The Corps' Geotechnical Appendix to the EIS (Appendix B, dated May 3, 2001) states:

As mentioned in the Introduction, the Imperial Beach disposal area has been dropped from further consideration as the disposal area for this project in favor of the LA-5 offshore disposal site because of the potential Navy ordnance issues. Beach compatibility analysis of the Central Bay sediments is not a part of this geotechnical appendix.

That referenced introduction states:

All of the project alternatives in the 1999 Draft F4 report identified Imperial Beach (part of the Silver Strand shoreline) as the receiving beach for the disposal of the project dredge sediments from the Central Bay. Since then, a decision has been made by the project team to eliminate the receiving beach concept from further consideration as a potential disposal site for the Central Bay sediments. This decision was made because a determination could not be made during the study that ruled out the presence of possible military (Naval) ordnance within the project sediments. The team examined engineered methods for screening the sediment for ordnance prior to placement at the receiving beach, but these methods did not prove cost effective for the project.

Further feasibility analysis of potential screening methods and costs was not included in the information submitted by the Corps. The Corps may be relying on a report the Commission has available in its files, the January 29, 1998, "Harris" report investigating the feasibility for the Navy of screening the over 5 million cu. yds. of material from the Navy's initial "Homeport" project (CD-95-95) (see pp. 5-7).

The Commission found in reviewing the Navy's modified proposal to dispose of the material at LA-5 (CD-140-97 and CD-160-97) that:

While the munitions constitute a human health hazard, the Commission believes the project as proposed is inconsistent with the sand supply and public access and recreation policies of the California Coastal Management Program (CCMP) (Coastal Act Sections 30233(b), 30210-30213, and 30220). The Commission further believes that feasible alternatives are available which would enable the project to be carried out in a manner consistent with these policies. While the Navy has concluded it would be expensive to screen the material to a level removing all munitions, the Navy has not documented its cost estimates. Nor has the Navy weighed the risk to the public from beach replenishment against the loss to the public and residents in the area from loss of significant quantities of beach sand. The Commission believes sifting or otherwise removing the munitions from the sand is a feasible alternative available to the Navy.

The Harris study analyzed the potential for screening the material to remove all objects 5/16 inches or greater in diameter. The study noted that it may be feasible to screen in a barge, but not on the beach. It also noted that "...screening dredge material to 5/16 inch on a dredging

project of this magnitude has never been undertaken. Contractor response to bidding of such a contract is anticipated to be very limited.” The study also concluded:

Alternatives for screening involve technologies that are untested and unproven for the quantities, flow rates, and material characteristics of this project. In short, no technologies or processes for sand screening were found to be practicable within the schedule and funding constraints of this project.

While the Commission did not have the details provided in the Harris study at the time of its objection, the information was available by the time the Navy decided to proceed with the project despite the Commission’s objection, which led the Commission to litigate the matter in court. One of the arguments the Navy made in court was that it should not have been expected to budget for sand screening because it was unaware of the presence of munitions at the time the project was being proposed and analyzed. The Commission requested that for future projects the Navy was now aware of this possibility and that it should be built into future budgeting cycles for San Diego Bay dredging. The Commission also requested that the Navy either screen the material or offset the sand losses by placing an equivalent amount of sand on area beaches. The Navy eventually partially complied (see pp. 5-7), through seeking legislative changes and reappropriating project funds, and working with Congress to seek supplemental funding, which was then provided to SANDAG (using some State matching funds) to be used to place approximately 2 million cu. yds. on 12 San Diego County beaches (Exhibit 12). Once the funds were secured, and other agreements entered into, the Commission dropped its objections and withdrew its lawsuit. The Commission ultimately found (in CD-9-98):

While the Commission acknowledges that munitions constitute a potential human health hazard, the Commission does not agree that the Navy has demonstrated screening the sand to be infeasible. With respect to alternatives other than nearshore disposal, while the Navy maintains that it would be expensive to screen the material to a level removing all munitions, the Navy has simply documented that screening would exceed current funds budgeted for the project. The Commission does not agree that exceeding previously-budgeted amounts renders the screening alternative infeasible. The Commission also believes the Navy has provided no compelling evidence that nearshore disposal cannot be performed safely, and the Commission further believes the public risk would be small from placing material in -15 to -20 ft. water depths, as the density of munitions would tend to minimize their transport up onto public beaches. Historically, the Commission has reviewed numerous Army Corps, Navy, and Coast Guard Consistency Determinations for San Diego Bay dredging with nearshore disposal (including CD-71-95, CD-26-94, CD-91-93, CD-53-87, CD-3-87, CD-33-85), without any known incidence of any munitions washing ashore. If the munitions are as widespread as the Navy currently maintains in its assumption that all ten reaches of the main channel are likely to contain munitions, then the odds are high that previous San Diego Bay dredging projects also included dredging of munitions. Nevertheless, the Navy

maintains that it cannot guarantee that no munitions would be transported onto beaches, and the Navy therefore rejects the nearshore disposal alternative as unsafe.

However if the Navy agrees to replace sand losses this disagreement can become moot. Pursuant to the "Stipulation Regarding Lifting of Preliminary Injunction and Order Thereon," the Navy has now agreed to the following commitments:

4. The Navy will pursue legislative changes in the authorization for the USS Stennis homeporting project which will allow the Navy to use all funds in excess of the actual dredging project costs for beach replenishment, the \$4,700,000 in so-called matching funds provided by SANDAG and any cost-savings realized through disposal at LA-5 instead of on shore or near shore disposal as originally authorized. This legislation will allow the use of any remaining channel dredging project funds for beach nourishment, allow the ability to use alternative sources of sand including borrow site sand instead of channel sand for beach nourishment, and include a change in the cost sharing requirements such that the Navy will not be limited to the matching funds requirement.

5. In accordance with and to the extent allowed by applicable law, the Navy will restrict the use of the excess funds identified in paragraph 4 for beach replenishment as mitigation for the impacts of the USS Stennis homeporting project, as required by the Commission's concurrence in Consistency Determination 95-95.

6. The Navy will support any legislation or legislative authorization which would provide additional funding for beach replenishment if such legislation provides for a net increase in the Navy's budget up to or equal to the amount needed to provide the total amount of sand identified for beach replenishment in the project as approved by the Commission in Consistency Determination 95-95, Consistency Determination 29-97 and Negative Determination 62-97.

If the Navy complies with these commitments, the Commission can find the project consistent with the dredging, sand supply, and public access and recreation policies of the Coastal Act (Sections 30233(b), 30210-30213, and 30220). This conclusion is based on the expectation that these legislative and other efforts will be successful in providing the total amount of sand identified for beach replenishment in the project as approved by the Commission in CD-95-95 (and/or as subsequently modified to equal the total amount of sand actually dredged by the Navy).

In the Navy's subsequent large dredging/homeporting project (CD-89-99), which included 534,000 cubic yards of dredging from Berth J deepening, which is adjacent to (just west of) the

Corps' proposed main channel dredging (area identified as "Naval Turning Basin" on Exhibit 3), the Navy placed the material in nearshore bay waters creating intertidal/subtidal habitat, southeast of the Naval Amphibious Base in Coronado. This disposal location meant the material was not being lost to the littoral system (as would LA-5 disposal). As discussed below, the Navy conducted pre- and post-disposal surveys to determine whether any munitions could be detected in sediments that were being dredged and disposed in the Bay. The pre-construction survey results were as follows:

Magnetometer and diver surveys were completed in May 1998 in the vicinity of Pier J/K to assess the presence of munitions in bottom sediments. These surveys did not detect munitions. In addition, sediments were tested for explosive compounds and none were detected (See the RCRA-based evaluation submitted with this CD).

As noted in ND-063-00, the Navy's negative determination for modifications to CD-89-99, as part of the Regional Water Quality Control Board's monitoring and reporting program the Navy was required to comply with the following:

ENHANCEMENT SITE ORDNANCE SURVEY. The discharger shall survey the NAB enhancement site down to mean lower low water (MLLW) for ordnance monthly for the first year, and quarterly for the next four years. The discharger shall submit quarterly statements certifying under penalty of perjury as specified under Reporting Requirement D.8c that all ordnance observed or detected during the quarterly period has been removed in accordance with Specification B.6 and disposed of properly.

The post-disposal surveys to date have not shown evidence of any active munitions from this dredge material.¹ The location of the Corps proposal dredging is at least 3 miles from the nearest area where the Navy found munitions during the first homeport dredging project (i.e., in Area 4, Exhibit 11). In fact, the Corps' technical analysis (Draft EIS Appendix B, p. B-11) acknowledges:

Ordnance was not encountered during the 1998 explorations and is not expected to be encountered during dredging for this project, since it was not observed or encountered in any of the materials removed during the Corps 1975-dredging project..." [emphasis added].

Nevertheless the Corps concluded:

However, the final decision was made by the Central Bay project study team in the final F4 Feasibility Report to not dispose of any of the project's dredged sediments at Imperial Beach or any other local beach. This decision was based on the assumption

¹ See Final Summary Report, Site Surveys During the Period of 9 July 2001 to 23 September 2002, Munitions Debris Site Survey at the Naval Amphibious Base Habitat Enhancement Site Coronado, California, U.S. Navy, 15 January 2003.

that there is still a possibility of ordnance remaining, even in consideration of the absence of ordnance from the 1975 Corps' dredging history of the Central Bay. Also, the study team considered screening the sediment for ordnance prior to beach disposal and agreed that the screening process selected would most likely resemble one of the screening alternatives mentioned in the Navy Screening Report (1998) and therefore would not be cost effective. An additional factor supporting this cost ineffectiveness is the fact that only 365,000 meters³ (477,400 yd³) of beach compatible material would be available

One of the Navy's dilemmas was the vast quantity of material (over 5 million cu. yds.) it was being asked to consider screening, on short notice (i.e., once the project had already commenced). The Corps has not provided an explanation comparing the feasibility of screening approximately one tenth the amount the Navy faced. This vastly smaller quantity, as well as the advance knowledge the Corps had of the problem, should make it more, not less, feasible to screen or to build funding into the project for alternative beach nourishment. Moreover, the Corps already proposes some screening of the material, even for LA-5 disposal; the consistency determination/EIS states:

There is a possibility that unexploded ordnance/munitions exist in the dredge spoils from the proposed dredging area. For public safety reasons, screening of all dredge materials would occur prior to disposal at LA-5.

The Corps has not described this proposed screening, or explained why it can screen for munitions if disposing at LA-5, but not if disposing at a beach or nearshore site. As will be discussed further in the conclusion (subsection 6) below, the Commission finds that the Corps has not established that the material is unsuitable for beach replenishment, either due to sand content or potential munitions/ordnance reasons.

5. Cable Relocation. An additional issue raised by the project is the potential for impacts from the proposed 69 kV electric cable relocation. Drilling for the cable installation could result in drilling fluid releases on land where they could escape from the surface boring, or in the bay due to pressurization and release through sub-seafloor cracks in underlying bay sediments of the fluids. The Corps estimates the potential for bay releases to be small. Material and equipment will be on-site, if needed, to enable berms to be placed around the upland drill sites to capture any fluids released. The Draft EIS mentions the potential for adverse effects from such releases on eelgrass beds in the Bay; again, the Corps estimates any effects to be minimal, "... as the mud would likely spread along the bottom and below the leaves of the eelgrass." The Corps also notes any cleanup operations, if needed, would need to be carefully planned, as they could have more adverse effects than the releases themselves. The Corps has included the following minimization/mitigation measures to address potential fluids releases and eelgrass impacts:

- Pre-construction eelgrass surveys within 200 ft. of either side of the cable alignment, with post-construction surveys triggered in the event drill fluids are released;

- Controlled drill advance rate to minimize sudden pressure changes;
- Drill pressure and mud loss monitoring;
- Visual inspections in shallow waters;
- If fluids are released, the RWQCB (and the Corps, Regulatory Branch) will be contacted;
- Surface returns in shallow waters and in the eelgrass beds would be evaluated to determine if additional measures are warranted.
 - a) Minor surface returns would be monitored; if effects minor, no cleanup activities triggered;
 - b) Other surface returns would be monitored. Use of water jets may be considered to help disperse muds from eelgrass beds if necessary. Such water jets would be gentle enough to avoid direct disturbance of plants or their substrate. Other cleanup actions may also be desirable, and such actions would be determined quickly in consultation with appropriate regulatory agencies.
- A response plan would be prepared by the contractor and in place to deal with a potential surface return on dry land and in areas where muds could enter the bay from overland. In this situation, the surface return would be contained before it reaches the bay.

The Corps also states that, to minimize eelgrass impacts, the cable would not be fully removed:

It is not necessary to remove the entire cable. The nearshore portions of existing 69 kV cable would be abandoned in place to avoid direct impacts to eelgrass on the Coronado side of the alignment.

According to the Corps' Draft EIS, San Diego Gas and Electric (SDG&E) will be preparing a Storm Water Pollution Prevention Plan (SWPP) to comply with the Clean Water Act. The Corps also states that Best Management Practices for erosion and sediment controls would be implemented for any trenching activities. The Corps has indicated it can impose any necessary controls on SDG&E; however the Commission remains uncertain about the nature and level of the Corps' responsibility over this activity, which the Corps has insisted be included in the Draft EIS and consistency determination. The Commission staff has requested that the Corps provide additional details and clarifications as listed on pp. 10, which address drilling fluid spill contingency planning and monitoring, project permitting (if any), and details such as identifying the drill location, possible parking and recreation impacts, evidence of landowner permission, and details about where the cable would remain in place and, where it would be removed, the disposal location. The Corps has responded (Exhibit 13); however as of this date the staff has not had time to evaluate the responses. Absent adequate responses to these questions (i.e., questions no. 6-12 on page 10), including a commitment for preparing a drilling fluid spill contingency planning and monitoring plan prior to commencement of construction (see sample language below), the Commission lacks the information needed to find this portion of the project would avoid adverse effects to eelgrass habitat and would be consistent with the marine resources, water quality, and recreation policies of the Coastal Act. In reviewing fiber optic cable permits, the Commission has typically imposed a condition requiring:

Drilling Fluid Spill Contingency Plan. Prior to issuance of this permit, the applicant shall submit for Executive Director approval a project-specific horizontal directional drilling (“HDD”) fluid monitoring and spill contingency plan that includes: (a) an estimate of a reasonable worst case release of drilling fluids into marine waters caused by project operations; (b) a clear protocol for monitoring and minimizing the use of drilling fluids during HDD operations, including criterion for identifying an unanticipated drilling fluid release and proposed fracture sealants; (c) a response and clean-up plan in the event of a spill or accidental discharge of drilling fluids; (d) a list of all clean-up equipment that will be maintained on-site; and (e) the designation of the onsite person who will have responsibility for implementing the plan.

6. Conclusion. Assuming the biological test results indicate the material is suitable for ocean disposal, the primary issue raised by the proposal is whether the material is suitable for beach replenishment and whether such disposal would be feasible. The material is predominantly sand, which normally argues for beach or nearshore disposal. However the Corps questions whether the material is suitable for beach disposal for two reasons: (1) its beach compatibility analysis does not show the material to be within 10% sand content of nearby receiver beaches; and (2) given that the Navy found ordnance in the entrance channel during its nuclear carrier homeport channel deepening project (CD-95-95, CD-140-97, CD-161-97), the Corps states it cannot rule out the potential for active ordnance/munitions in the material.

On the first of these points, the Corps sediment analysis compared the dredge material with dry beach sand percentages only. If nearshore sand percentages are factored in (as discussed above, p. 15), the material is likely to pass the “within 10% of the receiver beach” rule-of-thumb for beach compatibility. In any event, because the material is over 80% sand, consistent with historic practice the Commission considers it suitable for beach replenishment, and certainly for nearshore disposal.

On the second point: (1) the Navy found munitions several (approximately 3) miles from where the Corps is proposing to dredge, and the Corps has provided no evidence that there would be ordnance or munitions in the project area; (2) the Navy recently dredged the central turning basin (CD-89-99) and has been monitoring the nearshore disposal site (for shallow water habitat creation) and found no evidence of active munitions as the disposal site; (3) the Corps states it intends to screen the material before disposal at LA-5 but has not explained why it can screen in the open ocean but not at a nearshore disposal site (such as at Imperial Beach); (4) the Navy was faced with the difficult task of screening over 5 million cu. yds. of material; the Corps has not substantiated the cost infeasibility of screening approximately one tenth that amount; (5) the Commission sued the Navy when the Navy proposed LA-5 disposal; the matter was resolved only when the Navy worked with Congress to appropriate funds to be used to replace the sand being lost; and (6) when the Commission objected and then litigated this concern in 1997-1998, the Commission noted that a federal consistency applicant should not rely on lack of project appropriations to avoid meeting Coastal Act requirements. The Commission’s position was codified and incorporated into the federal consistency regulations

when they were revised on December 8, 2000 (effective January 8, 2001). The federal consistency regulations (15 CFR Section 930.32(a)(3)) now provide:

(3) For the purpose of determining consistent to the maximum extent practicable under paragraphs (a)(1) and (2) of this section, federal legal authority includes Federal appropriation Acts if the appropriation Act includes language that specifically prohibits full consistency with specific enforceable policies of management programs. Federal agencies shall not use a general claim of a lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent in Federal budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program. The only circumstance where a Federal agency may rely on a lack of funding as a limitation on being fully consistent with an enforceable policy is the Presidential exemption described in section 307(c)(1)(B) of the Act (16 USC 1456(c)(1)(B)). In cases where the cost of being consistent with the enforceable policies of a management program was not included in the Federal agency's budget and planning processes, the Federal agency should determine the amount of funds needed and seek additional federal funds. Federal agencies should include the cost of being fully consistent with the enforceable policies of management programs in their budget and planning processes, to the same extent that a Federal agency would plan for the cost of complying with other federal requirements. [Emphasis added]

In addition, SANDAG has written the Corps requesting it to consider nearshore disposal at Imperial Beach (Exhibit 10); however the Corps has not responded to this request, other than to generalize that: "... the Imperial Beach disposal area has been dropped from further consideration as the disposal area for this project in favor of the LA-5 offshore disposal site because of the potential Navy ordnance issues." The Corps has also not explained why it could not, as did the Navy, provide for replacement sand to offset the loss of approximately one half million cu. yds. to the littoral system. Therefore, given the high sand content in the proposed dredge material (above 80%), and absent evidence of munitions in the material or provisions for replacement quantities of sand, the project is inconsistent with the requirement of Section 30233(b) that material suitable for beach nourishment be disposed within littoral beach systems. The project is also inconsistent with two of the requirements of Section 30233(a): (1) because less damaging feasible alternatives to LA-5 disposal are available (e.g., disposal in the nearshore at Imperial Beach) and thus the project is not the least environmentally damaging feasible alternative; and (2) because the Corps has not agreed to provide replacement sand it has not provided feasible mitigation for sand losses.

In addition, without the completed biological tests (i.e., the bioassay and bioaccumulation tests), as well as commitments for Commission review of drill fluid contingency monitoring plans, the Commission lacks sufficient information to find the project consistent with the marine resources and water quality policies (Sections 30230 and 30231) or alternatives and mitigation tests of the dredging policy (Section 30233(a)) of the Coastal Act.

B. Public Access and Recreation. Sections 30210-30212 of the Coastal Act provide for the maximization of public access and recreation opportunities. Access and recreation activities on boating in the Bay would be temporary. Construction activities associated with relocation of the 69 kV utility cable would result in temporary (7 months) impacts/delays affecting businesses near Seaport Village/Kettner Blvd. in San Diego and the Ferry Landing Marketplace in Coronado. The Corps states that these impacts are likely to be minor in terms of effects on public access and recreation. In addition, the work has been scheduled to avoid peak recreation seasons. However, as discussed the previous section of this report, without assurances for retention of suitable beach sand in the region's beaches or littoral systems, the Commission is unable to find that the project would maximize public access and recreation opportunities and be consistent with Sections 30210-30212 of the Coastal Act. In addition, the Commission has not had time to review the Corps' response (Exhibit 13) to questions about potential parking and recreation-related issues associated with landfalls for the electric cable relocation portion of the project.

IV. SUBSTANTIVE FILE DOCUMENTS:

1. Draft EIS/EIR for San Diego Harbor Deepening (Central Navigation Channel), U.S. Army Corps of Engineers, November 2002.
2. U.S. Navy Consistency Determinations No. CD-95-95, CD-140-97, CD-161-97, CD-9-98, and CD-89-99, and Negative Determination ND-63-00 (Homeporting of Nuclear Air Craft Carriers, Naval Air Station North Island).
3. Coastal Development Permit and Amendments CDP-6-00-038 (and subsequent amendments 6-00-038-A1 and A-2, San Diego Association of Governments (SANDAG), Regional Beach Replenishment Project.
4. Final Report Central San Diego Bay Navigational Channel Deepening Project, Ogden, November 1998, for Port of San Diego.
5. Evaluation of Dredged Material Proposed for Ocean Disposal, Testing Manual, 1991 EPA/Corps ("Green Book").
6. Final Summary Report, Site Surveys During the Period of 9 July 2001 to 23 September 2002, Munitions Debris Site Survey at the Naval Amphibious Base Habitat Enhancement Site Coronado, California, U.S. Navy, 15 January 2003.